IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH, AT JAIPUR

S. B. CRIMINAL MISC. PETITION NO. 1366/2005

AJAY NAHTA
v
STATE OF RAJASTHAN & ANOTHER

Date of Judgment: **JULY 16, 2007**

Hon'ble Mr. Justice R. S. Chauhan

Mr. S.R. Surana for the petitioner.
Mr. B.K. Sharma, Public Prosecutor.
Mr. R.K. Mathur for respondent No.2.

By Court:
REPORTABLE

The petitioner has challenged the order dated 17.1.04 passed by the Addl. Civil Judge (Jr. Division) & Judicial Magistrate No. 16, Jaipur City and the order dated 14.10.05 passed by the Special Judge, (SC & ST Court), Jaipur. By the former order, the learned Magistrate has dismissed the application filed by the petitioner under Section 311 of the Criminal Procedure Code ('the Code' for short). By the latter order, the learned Judge has upheld the former order.

The brief facts of the case are that the non-petitioner No.2, Smt. Neera Jain had submitted a complaint against the petitioner, Shri Ajay Nahta for offences under

Section 138 read with Section 142 of the Negotiable Instruments Act ('the Act' for short). According to the complaint, the complainant claimed to be the proprietor of M/s. Choice. She further claimed that she was engaged in selling of marble statues and marble artifacts. She further stated that her husband, Shri Sunil Jain, is the manager of the said firm. Therefore, he is involved in the functioning of the firm. Thus, he is well aware of the facts of the case. Hence, she gave a power of attorney in his favour. According to the complainant, the accused petitioner was the proprietor of M/s. Ajay Arts and in that capacity he had bought marble statues and marble items from the complainant. By way of part payment, he had given the complainant a cheque, cheque bearing No. 824674 dated 5.5.2000 drawn at Bank of Baroda, M.I. Road, Jaipur for an amount of Rs. 13,00,000/- (Rupees Thirteen Lacs Only). The said cheque was deposited for encashment on 8.5.2000. However, the cheque was returned with the endorsement that “sufficient fund does not exist in the account”. Thereafter, on 17.5.2000 the complainant sent a registered notice as required under the law. The said notice was also sent on 20.5.2000,

through the U.P.C. While the petitioner refused to accept the registered notice, he did receive the notice sent through the U.P.C. Even after the receipt of the notice, he did not pay the amount due. Therefore, offence under Section 138 read with Section 142 of the Act was made out. The power of attorney, Mr. Sunil Jain was examined as P.W.1 ; he was also cross-examined by the petitioner's counsel. Although his testimony shall be dealt with later in this judgment, but for present purpose, suffice it to say that in his cross-examination the witness had given an undertaking that he would submit the account book and the income-tax returns, if so required, before the court. However, despite his undertaking, the witness failed to do so. Therefore, the petitioner moved an application before the court requesting that the said documents be summoned from the witness. However, vide order dated 24.4.02, the said application was dismissed by the learned trial court. Aggrieved by the order dated 24.4.02, the petitioner had submitted a revision petition before the Addl. Sessions Judge (Essential Commodities Act) Jaipur. However, vide order dated 5.11.03 the learned Judge had dismissed the revision petition.

Subsequently, after the close of prosecution witness, after recording of accused petitioner's statement under Section 313 of the Code, but before the final arguments were heard, the petitioner moved an application under Section 311 of the Code. In the said application the petitioner pleaded that P.W.1, Mr. Sunil Jain should be recalled as certain vital questions were not put to him during his cross-examination. However, vide order dated 17.1.04 the learned Magistrate dismissed the said application. The petitioner, thereupon, filed a revision petition before the learned Judge. But, vide order dated 14.10.05 the learned Judge has dismissed the said petition. Hence, this petition before this court.

Mr. S.R. Surana, the learned counsel for the petitioner, has vehemently argued that the scope and ambit of Section 311 of the Code is extremely wide. The said power is to be exercised “for the just decision of the case”. Moreover, the said power can be exercised by the court “at any stage of the trial”. According to the learned counsel since during the cross-examination certain relevant questions could not be put to P.W.1, Mr. Sunil Jain, he should have been recalled and re-

examined for the benefit of the petitioner. According to the learned counsel the said witness had given an undertaking in his cross-examination that he would submit the copies of the account books and the income-tax returns. However, the witness did not produce the said documents before the court. Therefore, in order to buttress the defence, the witness had to be recalled and the said documents should be produced in the court. The learned counsel also submitted that relevant questions with regard to Ex. P.10 to P.12, the bills for the artifacts sold to the non-petitioner, had to be put to the said witness. Thus, the witness should have been recalled for “the just decision of the case”. However, the learned court, according to the learned counsel, failed to exercise the vast jurisdiction granted under Section 311 of the Code. In order to buttress the argument, the learned counsel has relied upon on the case of Rajendra Prasad Vs. The Narcotic Cell Through Its Officer in Charge, Delhi (1999 Cr.L.R. (SC) 434), Zahira Habibullah Sheikh (5) & Anr. Vs. State of Gujarat & Ors. ((2006) 3 SCC 374), Ram Swaroop Vishnoi Vs. State of Rajasthan (2006 (1) R.C.C. 63) and lastly Girdhari Lal Vs.

State of Rajasthan (2006 (2) R.C.C. 751).

On the other hand, Mr. R.K. Mathur, the learned counsel for non-petitioner no.2, has strenuously argued that the petitioner has not come before the court with clean hands. Even earlier, the petitioner had moved an application for summoning the documents. The said application was dismissed vide order dated 24.4.02. Thereupon, the petitioner had filed a revision petition, but the same was dismissed vide order dated 5.11.03. The petitioner has not revealed these facts in the petition before this court. Therefore, the petitioner has withheld vital facts from the court in order to mislead the court. Secondly, Section 311 of the Code grants a discretionary power to the trial court for recalling and re-examining a witness and such a power is a vast one. Therefore, it has to be exercised sparingly. It should, in fact, be exercised only when it is necessary for “the just decision of the case”. Thirdly, he has taken us through the entire testimony of P.W.1, Mr. Sunil Jain and has argued that Mr. Sunil Jain had proved Ex. P.10 to P.12. Moreover, he was extensively cross-examined about Ex.P.10 to P.12. Fourthly, in case the witness has not

produced the two documents namely, the account books and the Income-tax returns, an adverse inference could certainly be read against the complainant. Fifthly, that the defence taken by the petitioner in his statement recorded under Section 313 of the Code is that he has signed the cheque under duress. Most importantly, this defence cannot be strengthened by recalling and re-examining the witness or by summoning the documents. Sixthly, that ample opportunities were given for cross-examining the witness. In fact, the witness has been cross-examined thoroughly. Lastly, that the application has been filed after the prosecution evidence has been closed, the statement of the accused have been recorded under Section 313 of the Code, the defence has agreed that they do not wish to examine any witness and when the case was ripe for final arguments. Hence, it is a delay tactic adopted by the petitioner to escape the day of judgment.

We have heard both the learned counsels and have perused the record of the case as well as the impugned orders.

Section 311 of the Code reads as under :-

> 311. Power to summon material witness, or examine person present.--Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

In the case of Zahira Habibullah Sheikh (supra), the Hon'ble Supreme Court had an occasion to analyse the said provision. The Hon'ble Supreme Court observed as under :-

> The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps <u>if the new evidence appears to it essential to the just decision of the case.</u> This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with

regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. (Emphasis added).

Thus, while exercising its discretionary power the Court has to consider whetherany new evidence needs to be brought on record and whether the recalling and re-examining of a witness is essential for the just decision of the case.

In the case of Rajendra Prasad (supra), the Hon'ble Court countered the oft repeated contention that while exercising the power under Section 311 of the Code, the court should not permit the prosecution to fill up the lacuna left by it during the trial. The Apex Court observed as under :-

> Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.(Emphasis added).

Thus according to the Hon'ble Supreme Court such a power is to be exercised if evidence was not adduced or

relevant material was not brought on record due to any inadvertence. In the case of Mohanlal Shyamji Soni Vs. U.O.I. (AIR 1991 SC 1346) the Apex Court observed about filling up of lacuna, “It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.” A conjoint reading of these observations lead to the following conclusion :

Firstly that the power under Section 311 Cr.P.C. is a vast one. Secondly, the said power can be exercised at any stage of the trial. Thirdly, such a power should be exercised if new evidence is sought to be brought on record – the new evidence being germane to the issue involved, or if proper evidence was not adduced, or relevant material was not brought on record due to any inadvertence. Fourthly, the said

power should be exercised for the just decision of the case. Fifthly, whether to exercise the power or not would depend on the facts and circumstances of each case.

In order to examine the validity of the impugned orders, it is essential to consider the facts and circumstances of the present case. The complaint was filed on 24.6.2000 and the cognizance was taken on 1.11.2000. The statement of P.W.1, Mr. Sunil Jain was recorded on 15.2.02. On 26.4.02 an application was moved by the petitioner for summoning the account book and the Income-tax returns from the witnesses. The said application was rejected vide order dated 24.4.2002. The petitioner had filed a revision petition against the said order. However, vide order dated 5.11.03, the Addl. Sessions Judge (Essential Commodities Act), Jaipur had rejected the said revision petition. Subsequently, the petitioner had moved the application under Section 311 of the Code. As noted above, the said application was dismissed vide order dated 17.1.04. The petitioner thereupon filed a revision petition before the learned Judge, who vide order dated 14.10.05 dismissed the revision petition. Thus, the case has been pending from the

year 2000 till 2007 i.e. for the last seven years. Moreover, during this period the petitioner has already tried to summon the documents and the request has been dismissed both by the learned trial court and by the revision court. Such rejections have achieved finality.

A bare perusal of the testimony of P.W.1 clearly reveals that in his examination in chief he has stated as under :-

" अभियुक्त को बेचे गये माल के बिल Ex. P 10/1 , Ex. P11/1, Ex. P 12/1 है। जिनकी असल Ex. P10,11, व 12 है उक्त बिलों पर अभियुक्त के माल प्राप्ति के हस्ताक्षर लिये गये हैं जो क्रमश A to B स्थान पर है।

and in his cross-examination he has stated as under :-

"मैंने अजय नाहटा से फाउण्टेन , टेबल टॉप वगैरह मार्बल से बने आइटम बेचे थे। माल का बिल एक्जी पी.10/1 दिनांक 12.1.2000 का है। Ex. P11/1 दिनांक 12.1.2000 Ex. P11/ दिनांक 27.1.2000 का है। मेरी फर्म मैसर्स चौइस रजिस्टर्ड है मैंने इन बिल्स का वर्णन (खाता, राशि व आइटम) इन्कम टेक्स के रिर्टन में है मेरे खातों में भी इन सब की प्रविष्टियां है आवश्यकता पड़ने पर इन बिल्स Ex. P10 से 12 के खाते व रिर्टन की कॉपी न्यायालय में प्रस्तुत कर दूंगा।"

The examination and cross-examination clearly reveal that the witness was meticulously examined about Ex.P.10 to P.12. Therefore, the relevant questions with regard to Ex. P.10 to P.12 were already put to him during the course of cross-examination. Even if the witnesses had undertaken to produce the two documents mentioned above and even though he may not have produced the same, the court would be justified in reading adverse inference against the complainant in accordance with Section 114 of the Evidence Act. Moreover, the petitioner had filed an application seeking the summoning of these two documents. As mentioned above the said application and the revision arising therefrom had already been rejected by the competent court. Since the order of the revision court dated 5.11.03 was not challenged any further, the same has achieved finality. Thus, the recalling of the witness, the summoning of the documents is not necessary for the just decision of the case.

A bare perusal of the order dated 17.1.04 shows that the learned trial court had duly applied its judicious mind and had concluded that ample opportunity was given and

sufficient cross-examination was done of the witness. Therefore, it had validly refused to exercise its jurisdiction vested under Section 311 of the Code.

Lastly, the progress of the case from the year 2000 to 2007 clearly reveals that the application under Section 311 was submitted at the penultimate point before the conclusion of the trial. Therefore, the said application was submitted in order to delay the judgment and in order to escape the liability which may be imposed by the court. Thus, the application was moved as a subterfuge to delay justice.

In the result, this petition has no force. It is, hereby, dismissed.

(R.S. CHAUHAN) J.

MRG.